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Supreme Court, U.S.
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Case No. 92-1879

In The

Supreme Court of the United States

October Term, 1992

PLUMBERS LOCAL UNION NO. 94, AFL-CIO
Petitioner

vs.

KOKOSING CONSTRUCTION CO., ET AL.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, FIFTH APPELLATE DISTRICT CANTON, OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE CASE

Respondent City of Canton agrees in part with the Statement of the Case as presented by Petitioner except as to the following issues:

Petitioner omits to say that on January 29, 1988, Daniel Fonte, Business Agent of Petitioner Plumbers Local Union No. 94 ("Plumbers" or "Petitioner"), filed a "Prevailing Wage Complaint" with the State of Ohio, Department of Industrial Relations ("DIR") and that Fonte was subsequently advised that an inspector was assigned to investigate the matter. Petitioner has filed other complaints with the DIR in the past, including a complaint regarding Respondent with Kokosing Construction Company's ("Kokosing") use of members of Respondent Laborers' Local 1015 ("Laborers") to do piping work at the Waste Water Treatment Plant in Wooster, Ohio

On August 4, 1988, Petitioner filed a complaint for declaratory and injunctive relief in the Ohio Court of Claims, seeking to compel the DIR to determine that the work at issue in this lawsuit be paid for at the prevailing wage rate for Plumbers, as determined under Ohio Revised Code ("O.R.C") section 4115.05. **Plumbers Local Union No. 94 v. Ohio Dept. of Industrial Relations,** Case No. 88-07618 (Ct. Cl. 1988). This action was dismissed, the Court of Claims finding that it was without authority to grant relief in the form of mandamus, and that Plaintiff's remedy lay, if at all, in either an administrative appeal or in a writ of mandamus in a court having jurisdiction over such actions. The Court of Claims' decision was upheld on appeal. See, **Plumbers Local Union No. 94 v. Ohio Dept of Industrial Relations,** Case No. 88AP-1047 (Franklin Cty. 1990).

With the dismissal of the lawsuit, the Plumbers again filed a complaint over the same issues as raised in its prior complaint. Counsel for the Plumbers, however, stated in its January 25, 1989 correspondence, regarding the merit of the new complaint:

> The Department failed to utilize the Plumbers' labor agreement to set the prevailing wage rates, but apparently utilized the Laborers' labor contract.

Counsel for the Plumbers was advised that a complaint had already been filed in January of 1988. The Plumbers then initiated the instant suit on November 13, 1990.

While the Plumbers' original complaint alleged Kokosing's violation of the prevailing wage laws, the Plumbers' amended complaint, filed on July 26, 1991, set forth a new theory in attempt to recover in this action. The Plumbers now alleged that the City of Canton had a statutory obligation under O.R.C. section 153.50 to require "separate and distinct proposals" to be made for furnishing work for "each separate and distinct trade or kind of labor." The Plumbers were now complaining that the City did not "separately bid the mechanical piping, including the fitting, laying, fabricating or otherwise installing large and/or complex piping for the project."

Petitioner alleges in its Statement of the Case that it was not seeking "assignment of any particular work for its own members." Petition for Certiorari at 11. What Petitioner fails to mention is that this suit is only a continuation of a long-standing battle between the Plumbers and the Laborers as to which union specific work should be allocated. Petitioner hopes that a favorable judgement in the instant case will compel a public authority to award such work to the Plumbers in the future, where it has in the past been awarded to the Laborers.

Petitioner also alleges that Soehnlen Piping Company ("Soehnlen"), one of the Petitioner's signatory contractors and an unsuccessful bidder upon the general construction contract, would have underbid Kokosing on the work in question had the City been required to accept bids with the work categorized as Petitioner suggests. This assertion rests on the Plumbers' contention that the work was improperly

allocated among the contracts, a "work jurisdiction" question, which, as we shall see, is preempted by the National Labor Relations Act ("NLRA"). Soehnlen, like the Plumbers, made no complaints while the bidding was in process, and Soehnlen bid upon the general construction contract as presented and was rejected in favor of Kokosing's lower bid. The contract was to be awarded on the basis of the entire bid, rather than on each particular item. Thus the actual bid prices represented for each particular item are irrelevant. The fact that Soehnlen's bids on certain enumerated items may have been lower than other bidders' (while other items were, indeed, much higher) is only relevant if the contract had been bid in the manner belatedly urged by the Plumbers. This is an issue that could only be resolved under the heading of "work jurisdiction."

Petitioner also maintains that the Laborers had not performed this type of work in the "locality" as defined in O.R.C. section 4115.03(D) (e.g., Stark County), whereas the Plumbers had performed "similar" work on waste water treatment plants elsewhere in Stark County (e.g., Massillon, Alliance, Orrville, and Navarre, Ohio). Petition for Certiorari at 22. However, by the very nature of the Plumbers' trade, they could only have performed "this type" of (not identical) work when it was offered under the heading of "Plumbers' Work." Petitioner inevitably comes back to the preempted work jurisdiction issue. The Laborers have also done similar, even identical, work in the area for many years, in accordance with such traditional work jurisdiction factors as past practice, existence of a bargaining relationship, industry practice and efficiency of operations. These factors led Theresa Fitchpatrick, Chief of the Wage Division of the DIR at the time of the Canton project to conclude after her investigation of the matter,

> ...In my mind I was completely satisfied that the Laborers had been doing the work for the past ten years, the Plumbers and Pipe Fitters had not been doing or could not prove

> to me that they had been doing it, therefore it was very clear that I had to say that...you would need to classify employees as laborers for that type of work.

As such, the Plumbers' argument comes down to a simple claim of miscategorization of the work at issue, a claim preempted by the NLRA and one which this Court should abstain from addressing.

LAW AND ARGUMENT

A. PETITIONER'S PREVAILING WAGE CLAIM IS PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT

Petitioner's case is premised upon the assertion that the installation of process piping is "Plumbers' Work", subjecting the work to the prevailing wages as determined for Plumbers as opposed to Laborers. As the Trial Court correctly found, the Plumbers' claim was not in substance a prevailing wage claim, but rather a work union jurisdiction claim, and as such, preempted by the National Labor Relations Act ("NLRA"). In framing their claims as a prevailing wage issue, Petitioner does no more than thinly disguise a work jurisdiction claim in order to circumvent NLRA preemption.

In determining whether a state law is preempted, the subject matter of the law must first be tied to a federal law covering the same field. **Hines v. Davidowitz,** 312 U.S. 52, 64-68 (1941). Under the Supremacy Clause of the United States Constitution, Federal legislation supersedes state law where Congress indicates an intent to displace all state laws on the same subject. **Rice v. Santa Fe Elevator Corp.,** 331 U.S. 218 (1947). The NLRA was passed in 1935 in order to provide a "coherent basis for . . . delicately structuring the balance of power" among the competing forces of labor-management relations and employee rights. **Amalgamated Assn. of Street Employees v. Lockridge,** 403 U.S. 274, 286 (1971).

Under Ohio's prevailing wage law, "(t)he prevailing rate of wages to be paid for a legal day's work . . . shall not be less . . . than the prevailing rate of wages then payable in the same trade or occupation in the locality where such public work is being performed, under collective bargaining agreements or understandings . . ." O.R.C. sec. 4115.05 (emphasis added). Thus, the Ohio Department of Industrial Relations ("DIR") was only obligated to protect the prevailing

rate structure within the locality as reflected in the applicable collective bargaining agreements. The DIR was not required to, and did not, concern itself with the competing claims for work by different trades. Absent contractual means of resolving such disputes, Congress has vested the National Labor Relations Board with the exclusive authority and obligation to resolve competing claims to work. **NLRB v. Radio & Television Broadcast Engineers Union Local 1212 (Columbia Broadcasting System),** 364 U.S. 573 (1961). Thus, such claims, under whatever label they are presented, are subject to analysis under the NLRA only. Indeed, the NLRB has addressed such disputes in the past and has refused to tolerate attempts at misapplication of state prevailing wage laws. The NLRB found that a prevailing wage suit filed by Iron Workers in Nevada alleging that a contractor was in violation of the state prevailing wage law by "use of non-skilled labor. . ." was no more than a "weapon in a jurisdictional dispute." **Iron Workers Local 118 (Clark & Sullivan Contractors),** 305 NLRB No. 34 (1991). The Union was ordered to cease and desist from such conduct.

When the NLRB has addressed issues such as Petitioner's under the appropriate categorization of work jurisdiction disputes, it has consistently held that the work claimed by the Plumbers is properly classified as "Laborers' Work." See, e.g., **R.W. Wander, Inc.,** 176 NLRB 935 (1969) (NLRB awards work of unloading and laying of pipes at water treatment plant to Laborers rather than Plumbers); **The Ashton Co., Inc.** 256 NLRB 1022 (1981) (NLRB awards work of installing process piping to Laborers rather than Plumbers).

Thus, based upon the true nature of Petitioner's claim, the construction of O.R.C. sec. 4115.05, the fundamental purposes of the NLRB and the Ohio DIR, and the prior holdings of the NLRB itself, it is obvious that Petitioner's "prevailing wage" claim is in reality a "work jurisdiction" dispute, preempted by the NLRA. As such, Respondent City of Canton respectfully requests that the petition for writ of certiorari be denied.

B. PETITIONER'S O.R.C. SECTION 153.50 CLAIM AGAINST THE CITY OF CANTON IS PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT AND IS MOOT.

Ohio's "Separate Bid" law states that a public authority accepting bids for improvements upon public utilities "shall require separate and distinct proposals to be made for . . . doing such work . . . for each separate and distinct trade or kind of mechanical labor . . . entering into the improvement." O.R.C. sec. 153.50. Petitioner alleges that the City of Canton violated O.R.C. 153.50 by including the disputed work in the "general construction" portion of its proposal rather than in the "plumbing installation" portion. Petitioner's argument is, in effect, not that the City did not require separate bids for the work, but rather that the work was improperly separated and categorized. As with the Petitioner's "prevailing wage" argument, this claim amounts to no more than an attempt to disguise a "work jurisdiction" claim. As the Stark County Court of Common Pleas correctly found, and the Court of Appeals of Ohio (5th Appellate District) affirmed, Petitioner's issues are not properly brought under O.R.C. sections 4115 and 153 and are preempted by the National Labor Relations Act.

In any event, Petitioner's section 153 dispute in regard to the bidding procedures employed by the City of Canton is moot. On March 30, 1987, the City advertised for bids for a general construction contract at the Canton Wastewater Treatment Plant. The contract with Kokosing was entered into on or about May 27, 1987. Petitioner made no protest or complaint about the bidding procedures implemented by the City at the time the bids were being solicited, nor did Petitioner seek to enjoin performance of work after the contract had been awarded. Petitioner did not file a complaint with the Ohio Director of Industrial Relations until on or about January 13, 1988, nor did Petitioner file the instant

suit until November 13, 1990. On a similar complaint, the Supreme Court of Ohio found that allegations that "bidding procedures used by the city for (a) water treatment project were illegal, as a violation of R.C. 153.50 and 153.51" were moot:

> "At the time bids were submitted . . . appellants made no protest or complaint about the bidding procedures. They did nothing until after a contract had been awarded . . . No motion has been made by appellants to forestall the start or continuation of the project. Under the posture of this case, therefore, the disputed issues are moot."

National Electric Contractors Association v. City of Painesville, 36 O.S.2d 60, 61, 303 N.E.2d 870, 871 (1973). In the instant case, no complaint was made until over six months after the contract was awarded, and the instant suit was not filed until nearly three years later. Any dispute as to the bidding procedure is clearly moot.

In light of the foregoing, Respondent City of Canton maintains that Petitioner's O.R.C. section 153.50 claim is preempted by the NLRA and is moot, and respectfully requests that the petition for writ of certiorari be denied.

C. THE SUPREME COURT SHOULD ABSTAIN FROM GRANTING CERTIORARI IN ORDER TO AVOID NEEDLESS FEDERAL INTERFERENCE WITH A STATE ADMINISTRATIVE POLICY.

The State of Ohio's Department of Industrial Relations (DIR) is a state administrative agency with the responsibility of, among others, determining the prevailing wage to be paid for labor upon a public improvement. On January 29, 1988, Petitioner filed a complaint with the DIR that the work at issue upon the City of Canton's Water Pollution Control Center should be subject to the prevailing wage for "Plumbers's Work" as opposed to "Laborers' Work." When the DIR made the determination that the work at issue had been properly paid for according to the prevailing rate for Laborers, such conclusion was within the scope of the DIR's responsibilities. The determination was also consistent with such factors as past practice, existence of a bargaining relationship, industry practice, and efficiency of operations.

Upon this adverse determination, Petitioner proceeded to pursue the claim in the state courts of Ohio, including the Ohio Court of Claims, the Court of Appeals of Ohio (10th Appellate District), the Stark County Court of Common Pleas, the Court of Appeals of Ohio (5th Appellate District) and the Supreme Court of Ohio. Petitioner's state remedies are now exhausted; at every level, the state courts of Ohio have held adversely to Petitioner. But instead of accepting the situation as such, the Plumbers now petition the Supreme Court of the United States for Writ of Certiorari.

The Supreme Court should abstain from reviewing Petitioner's issues as an adequate state remedy has already been afforded and exhausted. Federal Courts should refrain from exercising jurisdiction in order to avoid needless conflict with the administration by a state of its own affairs. See, **Burford v. Sun Oil Co.**, 319 U.S. 315 (1943). The State of

Ohio has established the DIR with the purpose of addressing just such issues. Under **Burford,** the Court should abstain where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." **Colorado River Water Conservation District v. United States,** 424 U.S. 800, 814 (1976). As the state courts of Ohio have already made repeated determinations upon Petitioner's issues, the Supreme Court should afford a great deal of deference to their findings. See, **Lehman Bros. v. Schein,** 416 U.S. 386, 390 (1974). Federal review of these issues would do no more than foster duplicative litigation, and potentially cause "(d)elay, misunderstanding of local law, and needless federal conflict with the state policy." **Burford**, 319 U.S. at 327. "Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies." **Railroad Comm'n of Texas v. Pullman Co.,** 312 U.S. 496, 500 (1941).

In light of the foregoing, Respondent City of Canton respectfully requests that the Supreme Court defer to the administrative agencies and state courts of Ohio, and deny Petitioner's petition for writ of certiorari.

CONCLUSION

For the reasons and law stated above, Respondent City of Canton respectfully opposes this Court's jurisdiction over this appeal and requests that petition for writ of certiorari be denied.

Respectfully submitted,

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